LIBRARY
SUPREME COURT, U. S.
FILED
MAY 30

Supreme Court of the United States

October Term, 1973

No. 73-1793

BURTON MARKS,

Petitioner,

vs.

HOUSTON I. FLOURNOY, individually and in his capacity as Controller of the State of California; J. K. BAILLIE, individually and in his capacity as President of Los Angeles Federal Savings and Loan Association,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BURTON MARKS of
Burton Marks, A Professional Corporation
pro se
8383 Wilshire Boulevard, Suite 510
Beverly Hills, California 90211
Telephone: (213) 655-5011

Dean-Standefer, 326½ Main St., Huntington Beach, Ca. 92648 - (714) 536-7161

TOPICAL INDEX

Petition for Writ of Certiorari	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	3
Statement of Facts	3
Reasons for Granting the Writ	4
Argument	5
I The District Court has erroneously refused to take jurisdiction over a matter which rests exclusively within its jurisdiction, and which is expressly mandated by Title 28 United States Code § 1343	5
II The District Court applied an erroneous standard in its dismissal of petitioner's complaint with prejudice	7
Conclusion	7
Index to Appendix	
Appendix A through C	

TABLE OF AUTHORITIES CITED

Cases	Page
Fuentes v. Shevin (1972), 407 U.S. 67	7
Hagans v. Lavine (1974), ... U.S. ....., 42 L. W. 4381	4, 7
Lynch v. Household Finance Corporation (1972), 405 U.S. 538	7
Scheuer v. Rhodes (1974), ... U.S. ....., 42 L. W. 4543	4, 6, 7
Sniadach v. Family Finance Corporation (1969), 395 U.S. 337	7
Steffel v. Thompson (1974), ... U.S. ....., 42 L. W. 4357	4, 7
United States Constitution	
Amendment XIV	3
United States Code	
28 U.S.C. 1254(1)	3
28 U.S.C. 1341	5, 6
28 U.S.C. 1343	3, 5
42 U.S.C. 1983	3, 4, 5, 6
42 U.S.C. 1985	3, 4, 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. .....

BURTON MARKS,

Petitioner,

vs.

HOUSTON I. FLOURNOY, individually and in his capacity as Controller of the State of California; **J. K. BAILLIE**, individually and in his capacity as President of Los Angeles Federal Savings and Loan Association,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

This is a petition of Burton Marks for a writ of certiorari to review the order made by the United States Court of Appeals for the Ninth Circuit on March 4, 1974, affirming the order dismissing petitioner's complaint which was entered by the United States District Court for the Central District of California on May 14, 1973.

OPINIONS BELOW

The order of the District Court dismissing petitioner's complaint with prejudice has not been published in any official reports. A copy of that order is attached hereto as Appendix A.

The memorandum opinion of the Court of Appeals for the Ninth Circuit, filed on March 4, 1974, and not to be published, is attached hereto as Appendix B.

JURISDICTION

1. On March 29, 1973, petitioner filed a complaint for damages for conspiracy to violate Civil Rights in the United States District Court for the Central District of California. Respondents filed a Notice of Motion to Dismiss petitioner's complaint on April 16, 1973.

2. On May 7, 1973, a hearing was held on respondents' Motion to Dismiss, and at the conclusion thereof petitioner's complaint was dismissed with prejudice.

3. The District Court's order of dismissal was entered on May 14, 1973, said order being based on the lack of jurisdiction of the subject matter by the Court and the applicability of the abstention doctrine. A timely notice of appeal was filed on May 16, 1973.

4. On March 4, 1974, the United States Court of Appeals for the Ninth Circuit affirmed the order of the District Court dismissing petitioner's complaint with prejudice.

5. On March 29, 1974, the Court of Appeals for the Ninth Circuit granted petitioner's application for a Stay of

Mandate until April 15, 1974.

6. The jurisdiction of this Court is invoked under Title 28 United States Code § 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court may properly refuse to take jurisdiction over a matter which rests exclusively within its jurisdiction, and which is expressly mandated by Title 28 United States Code § 1343(1), (3).

2. Whether the District Court applied an erroneous standard in its dismissal of petitioner's complaint with prejudice.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The relevant statutory and constitutional provisions are set forth in Appendix C; they are 42 U.S.C. §§ 1983 and 1985, 28 U.S.C. § 1343(1), (3), and the Fourteenth Amendment to the United States Constitution.

STATEMENT OF FACTS

On August 18, 1972, petitioner, Burton Marks, opened a savings account with a branch office of the Los Angeles Federal Savings & Loan Association in Los Angeles, California. The sum of $20,000.00 was deposited in the account, which was held in joint tenancy with petitioner's mother.

On March 8, 1973, petitioner attempted to withdraw

all of his money, including accrued interest, which then came to the approximate sum of $20,311.00. Petitioner was prevented from withdrawing said funds because of certain policies and practices in which respondents were then, and continue to be, engaged. These policies and practices operate in such fashion as to enable respondent Flournoy, as Controller for the State of California, to withhold the personal property (money) of persons having accounts in joint tenancy with deceased persons, in order to insure the payment of taxes. This is accomplished without having to assess the tax liability of the joint tenancy, without the necessity of obtaining court orders for attachment and/or the issuance of any process, either administrative or judicial, and without the necessity of obtaining search and/or seizure warrants. Additionally, while such personal property is being withheld by the concert of action of respondents, it is being used by respondents to further their own personal, pecuniary gain.

REASONS FOR GRANTING THE WRIT

Petitioner requests that this Court review the decision of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the United States District Court, Central District of California, because recent decisions of this Court indicate that the maintenance of petitioner's suit is not only proper but falls clearly within the purview and the import of Title 42 United States Code §§ 1983 and 1985. Petitioner respectfully cites to this Court its decisions in *Hagans v. Lavine* (1974), ... U.S. ....., 42 L. W. 4381; *Steffel v. Thompson* (1974), ... U.S. ....., 42 L. W. 4357;

and *Scheuer v. Rhodes* (1974) ..... U.S. ..... , 42 L. W. 4543. (Supreme Court Docket Nos. 72-914 and 72-1318.)

ARGUMENT

I

The District Court Has Erroneously Refused To Take Jurisdiction Over A Matter Which Rests Exclusively Within Its Jurisdiction, And Which Is Expressly Mandated By Title 28 United States Code § 1343.

Petitioner's complaint alleges a conspiracy to violate his Civil Rights, and he has sought redress pursuant to Title 42 United States Code §§ 1983 and 1985, along with their jurisdictional counterpart, Title 28 United States Code § 1343. The District Court dismissed the complaint with prejudice, basing said dismissal on Title 28 United States Code § 1341 and the so-called "abstention doctrine" applied by federal courts with respect to State tax matters. And it is this section and the abstention doctrine which go to the very heart of the matter in controversy.

Petitioner's claim does not concern itself with § 1341 of Title 28, or the abstention doctrine, which is the body of case law that has been developed around that section. Petitioner does not seek to have the District Court "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law . . . . " Petitioner does seek to prevent, by way of an award for damages, the conspiracy entered into between the two respondents named herein (defendants below) to violate petitioner's Civil Rights by

depriving him of his property without due process of law. Contrary to all of respondents' arguments below, both in the District Court and in the Ninth Circuit, petitioner is not attacking the scheme of the State of California for the collection of inheritance taxes. There is a distinction between interfering with the process of collection of State taxes themselves and the actions of State tax collectors who interfere with and violate the constitutional rights of taxpayers. And while such distinction may be highly esoteric and beyond the grasp of respondents, it is certainly not beyond the grasp of this Honorable Court and is clearly a distinction which does exist. The fact of this distinction thus makes § 1341 of Title 28 inapplicable to the instant action, and it thereby does not act as a bar to petitioner's complaint.

The District Court and the Court of Appeals have adopted the contention set forth by the respondents, that collectors are somehow immune from all civil liability. This doctrine of absolute executive immunity has been set to rest by this Court in *Scheuer v. Rhodes,* ..... U.S. ..... , 42 L. W. 4543 (1974).

Section 1983 was designed to provide a specific remedy for the violation of Civil Rights done under color of State law. While petitioner is well aware that this section has been invoked in the past in an effort to circumvent the jurisdictional limitation of § 1341, and such invocation has consistently been rejected, petitioner's case is different and distinct from those other cases. As a result of the actions of the respondents, petitioner is being denied the right to access and use of monies belonging to him, without a prior adversary hearing, in violation

of the principles set forth in *Fuentes v. Shevin* (1972), 407 U.S. 67; *Lynch v. Household Finance Corporation* (1972), 405 U.S. 538; and *Sniadach v. Family Finance Corporation* (1969), 395 U.S. 337.

II

The District Court Applied An Erroneous Standard In Its Dismissal Of Petitioner's Complaint With Prejudice.

The District Court based its dismissal on the lack of subject matter jurisdiction and the applicability of the federal "abstention doctrine." The Court of Appeals has determined, inexplicably, that a Civil Rights lawsuit is a subterfuge for attempting to enjoin the collection of a State tax, which injunction is prohibited by federal statutory law. Petitioner herein submits that the rulings of both courts below ere erroneous and ill-considered in light of this Court's recent decisions in *Hagans v. Lavine* (1974), ... U.S. ..... , 42 L. W. 4381; *Steffel v. Thompson* (1974), ... U.S. ..... , 42 L. W. 4357; and *Scheuer v. Rhodes* (1974), ... U.S. ..... , 42 L. W. 4543.

CONCLUSION

If the questions here presented are not new and novel, then they have been decided adversely to the contentions of respondents. Petitioner respectfully submits that this Court grant his petition for writ of certiorari or, in the alternative, that this case be summarily remanded to the Court of Appeals for the Ninth Circuit for reconsideration

in light of the cases decided by this Court in its October 1973 term.

Respectfully submitted,

BURTON MARKS*

*RICHARD L. SOLOMON, a law student certified under the rules of the State Bar of the State of California, has assisted in the preparation of this petition.

INDEX TO APPENDIX

Page

Appendix A
Order of the United States District Court, Central District of California, filed May 14, 1973 1

Appendix B
Order Affirming, filed March 4, 1974, by the United States Court of Appeals, for the Ninth Circuit 2

Appendix C
Statutes and Constitutional provisions involved 3
42 U.S.C. § 1983
42 U.S.C. § 1985
28 U.S.C. § 1343
U. S. Constitution, Amend. XIV

APPENDIX A

ORDER
Filed May 14, 1973

[Prepared by Myron Siedorf, Walter H. Miller, James R. Birnberg, 107 South Broadway, Room 6125, Los Angeles, California 90012 - Telephone: 620-4707. Attorneys for Defendant, Houston I. Flournoy.]

United States District Court, Central District of California.

No. 73-683-MML.

BURTON MARKS, Plaintiff, vs. HOUSTON I. FLOURNOY, individually and in his capacity as Controller of the State of California; J. K. BAILLIE, individually and in his capacity as President of Los Angeles Federal Savings and Loan Association, Defendants.

This cause came on for hearing on May 7, 1973, on the motion of defendants, Houston I. Flournoy, individually, and Houston I. Flournoy, in his capacity as Controller of the State of California, to dismiss the action herein on various grounds, including the lack of jurisdiction of the subject matter by the court on the ground that 28 U.S.C. § 1341 and the abstention doctrine are applicable, requiring the non-intervention with state tax collection procedure, and the court having heard the arguments of counsel and being fully advised, and thereafter having ruled that the abstention doctrine was applicable herein, it is

ORDERED, ADJUDGED AND DECREED that the motion be and the same is granted and the complaint

dismissed with prejudice.

DATED: 5/14/73.

MALCOLM M. LUCAS
United States District Judge.

APPENDIX B

ORDER AFFIRMING
Filed March 4, 1974

"DO NOT PUBLISH"

United States Court of Appeals, for the Ninth Circuit.
No. 73-2141.

BURTON MARKS, Plaintiff-Appellant, vs. HOUSTON I. FLOURNOY, individually, and in his capacity as Controller of the State of California; J. K. BAILLIE, individually, and in his capacity as President of the Los Angeles Federal Savings and Loan Association, Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California

Before: CHAMBERS, KOELSCH and ELY, Circuit Judges.

PER CURIAM:

The order of the district court dismissing the complaint

is affirmed.

Marks has attacked a state tax law and he is incorrect when he says he didn't.

Abstention was proper. Cf. *Bland v. McHann*, 463 F.2d 21 (2d Cir. 1972).

APPENDIX C

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1985.

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities

under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

28 U.S.C. § 1343.

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) . . . .

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiciton of the United States; . . . .

United States Constitution
Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATE OF CALIFORNIA)
) ss.
County of Orange)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and employed in the County of Orange, State of California, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 326½ Main Street, Huntington Beach, California 92648, that on MAY , 1974, I served the within PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT (Marks v. Flournoy) on the following named parties by depositing the designated copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Huntington Beach, California, addressed to said parties at the addresses as follows:

Solicitor General of the United States
U. S. Department of Justice
Washington, D. C. 20530 (3 copies)

Messrs. Myron Siedof, Walter H. Miller,
and James R. Birnberg
107 South Broadway, Room 6125
Los Angeles, California 90012 (2 copies)

J. K. Baillie, President
Los Angeles Federal Savings & Laon Association
630 South Grand Avenue
Los Angeles, California 90017 (2 copies)

I declare under penalty that the foregoing is true and correct.

Executed on MAY , 1974, at HUNTINGTON BEACH, CALIFORNIA

D. A. Standefer

Dean-Standefer, 326½ Main St., Huntington Beach, Ca.
(714) 536-7161